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Supreme Court, U.S.
FILED

No. 0 [illegible]

IN THE

Supreme Court of the United States

ROBERT M. FRIEDLAND, PETITIONER

v.

TIC - THE INDUSTRIAL COMPANY; GEOSYNTEC CONSULTANTS INC., F/K/A GEOSERVICES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the collateral source rule applies to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, specifically, 42 U.S.C. § 9607(a) cost recovery and 42 U.S.C. § 9613(f) contribution actions.

2. Whether the Tenth Circuit erred in refusing to apportion prior settlements in order to determine if complete common damages were present.

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PETITION FOR WRIT OF CERTIORARI

Robert M. Friedland hereby petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

On January 18, 2008, the United States District Court for the District of Colorado dismissed Mr. Friedland's claims. That opinion is unpublished and can be found at 2008 WL 185693 and reproduced at 20a. On May 29, 2009. The United States Court of Appeals for the Tenth Circuit affirmed the Federal District Court decision. That opinion is published at 566 F.3d 1203 and reproduced at 1a.

JURISDICTION

The District Court had jurisdiction over Mr. Friedland's claims pursuant to 28 U.S.C. § 1331. The Court of Appeals had jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291. The Tenth Circuit Court of Appeals filed its opinion on May 29, 2009; Mr. Friedland filed his Petition for Rehearing En Banc on June 15, 2009, which the court of appeals denied on July 28, 2009. Thus, pursuant to Supreme Court Rule 13, this Petition is filed timely within 90 days of the entry of final judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Sections 107 and 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9607 and 9613(f), govern actions for cost recovery and contribution for costs incurred as a result of the release or threatened release of hazardous substances caused by operations or actions of potentially responsible parties ("PRPs").

42 U.S.C. § 9607(a) provides, in relevant part, that covered persons shall be liable for

> all costs of removal or remedial action incurred by the United States Government or a State....not inconsistent with the national contingency plan [and] any other necessary costs of response incurred by any other person consistent with the national contingency plan.... The amounts recoverable in an action under this section shall include interest on the amounts recoverable....

42 U.S.C. § 9613(f) provides that

> any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.... In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

Article III, § 2, cl. 1, of the United States Constitution provides as follows:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT

In 1996, the United States and the State of Colorado filed suit against Petitioner Robert M. Friedland, styled *United States of America and State of Colorado v. Robert M. Friedland, et al.*, Civil Action No. 1213 (D. Colo. filed May 23, 1996) ("Underlying Litigation"), seeking to recover the costs under CERCLA of responding to environmental contamination at the Summitville Mine Superfund Site located near Del Norte, Colorado. In 2000, Mr. Friedland settled the CERCLA case with the United States and the State of Colorado and entered into a Consent Decree that resolved the Underlying Litigation. Pursuant to the Consent Decree Mr. Friedland paid $20,723,181 to the United States and the

State of Colorado in exchange for a complete release of the governments' claims.

Following the entry of the Consent Decree, Mr. Friedland sought to recoup some of the amounts paid in settlement of the Underlying Litigation, as well as an amount in excess of $28,000,000 in defense costs he had incurred in defending himself in that action and related matters. Mr. Friedland recovered a portion of his costs from United States Fidelity and Guaranty Company ("USF&G") and The Travelers Indemnity Company and related Travelers entities ("Travelers") pursuant to insurance contracts under which Mr. Friedland was a first party insured.

This case, filed by Mr. Friedland in the United States District Court for the District of Colorado against Defendants-Appellees TIC-The Industrial Company ("TIC") and GeoSyntec Consultants Inc. f/k/a GeoServices, Inc. ("GeoSyntec"), was a cost recovery action pursuant to CERCLA § 107 and a contribution action pursuant to CERCLA § 113 in which Mr. Friedland proceeded against TIC and GeoSyntec as potentially responsible parties ("PRPs"). This action was filed to recover the costs Mr. Friedland incurred as a result of the release or threatened release of hazardous substances caused by operations or actions TIC and GeoSyntec managed, controlled and/or conducted at the Summitville Mine Site. The damages at issue in this CERCLA contribution action are not the same as the breach of contract claims and related claims resolved by Mr. Friedland's settlements with his insurers, USF&G and Travelers. That notwithstanding, TIC and GeoSyntec filed a Joint Motion for Summary Judgment on Damages claiming

full credit in this case as a result of the prior insurance recoveries by Mr. Friedland. On January 18, 2008, the District Court granted the motion and dismissed with prejudice Mr. Friedland's claims for cost recovery and contribution under CERCLA. On May 29, 2009, the Tenth Circuit affirmed the decision below, effectively rendering the recovery and contribution portions of CERCLA §§ 107 and 113 superfluous. Mr. Friedland filed his Petition for Rehearing En Banc on June 15, 2009, which the Tenth Circuit Court of Appeals denied on July 28, 2009. This Petition followed.

REASONS FOR GRANTING THE PETITION

The spirit and intent of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.* ("CERCLA") provides that polluters pay their respective shares of the cleanup costs. Application of the collateral source rule in the context of cost recovery and contribution actions under CERCLA is appropriate and necessary to achieve that purpose.

In the event the damages sought in a cost recovery or contribution action under CERCLA are appropriately setoff by prior settlements with other potentially responsible parties ("PRPs"), there must be a determination that the damages among the claims settled and the damages at issue in the CERCLA action are *completely* common. If such a determination is not made, or cannot be made, courts must undertake the factual inquiry and analysis to allocate and apportion the settlement amounts before any setoff may reasonably be made. Any other result necessarily

undermines the very principle of joint and several liability upon which CERCLA rests.

The result offered by the Tenth Circuit has a profoundly negative impact on the ability of PRPs under CERCLA to engage in voluntary cleanup activities or enter into settlements with their insurers or other PRPs. The requirement that settlement agreements expressly allocate the settlement amount between indemnity and defense costs will have a chilling effect on settlement and adversely impact the public interest in judicial economy and prompt environmental response. The Tenth Circuit's holding cannot be reconciled with the express provisions or the spirit and intent of CERCLA.

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THE LEGISLATIVE INTENT OF CERCLA §§ 107 AND 113(f)

The legislative intent and purpose of CERCLA Sections 107 and 113(f) is to ensure that polluters pay their way. It follows that the collateral source rule, consistently applied in tort contexts and other statutory frameworks, be applied to actions for cost recovery and contribution from others whose operations or actions resulted in the release or threatened release of hazardous substances for which those remedial or removal costs were incurred.

A. The Collateral Source Rule is Consistently Applied Outside the Context of Traditional Common Law Tort Claims

The collateral source rule holds that a wrongdoer is not entitled to have damages for which he is liable reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent source. *Jackson v. BNSF Ry. Co.*, 2008 WL 410591, at *1 (D. Colo. Feb. 13, 2008). The fundamental premise of the collateral source rule has been recognized in the common law of the United States for more than 125 years. *See Mo. Pacific Ry. Co. v. Jarrard*, 65 Tex. 560, 1886 WL 4714 (Tex. Feb. 23, 1886); *The Ohio and Miss. Ry. Co. v. Dickerson*, 59 Ind. 317, 1877 WL 6623 (Ind. 1877); and *Weber v. The Morris and Essex R. R. Co.*, 36 N.J.L. 213, 1873 WL 6884 (N.J. Sup. 1873).

Federal courts have recognized the doctrine as "well established and generally prevailing, and have repeatedly expressed their approval of it [and] ... have applied it as a rule of federal law when called upon to do so ...." *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 534 (9th Cir. 1962) (applying collateral source rule in context of Jones Act litigation); *Thyssen, Inc. v. S/S Eurounity*, 21 F.3d 533, 537-38 (2nd Cir. 1994) (applying collateral source rule in context of Carriage of Goods by Sea Act); *Jackson*, 2008 WL 410591 (applying collateral source rule in context of Federal Employer's Liability Act); *Stanley v. Bertram-Trojan, Inc.*, 868 F. Supp. 541, 543 (S.D.N.Y. 1994) (applying collateral source rule in context of maritime law).

> The question [is] not whether a windfall is to be conferred, but rather who shall receive the benefit of a windfall which already exists. As between the injured person and the tortfeasor, the former's claim is the better. This may permit a double recovery, but it does not impose a double burden. The tortfeasor bears only the single burden for his wrong. That burden is imposed by society, not only to make the plaintiff whole, but also to deter negligence and encourage due care.

Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 534 (9th Cir. 1962).

Collateral source funds that are created through the prudence and foresight of the plaintiff should not be turned to the benefit of a party against whom that plaintiff has a claim for damages. *Id.*, at 534-535.

B. The Collateral Source Rule Should Apply to CERCLA Cost Recovery and Contribution Actions

The application of the collateral source rule in the context of a CERCLA § 113 contribution action is a question of first impression in the United States Supreme Court. The collateral source rule has, however, been applied in comparable situations involving the recovery of contribution damages for environmental response costs incurred under an analogous state environmental law. *See La. Dep't of Transp. and Dev. v. Kan. City S. Ry. Co.*, 846 So.2d 734, 740 (La. 2003) (collateral source rule applies in cases under the Louisiana Environmental Quality Act where

a damaged party is seeking reimbursement for remediation expenses); *Town of E. Troy v. Soo Line R.R. Co.*, 653 F.2d 1123, 1132 (7th Cir. 1980) (the collateral source rule "prefers double recovery for a plaintiff to allowing a defendant to avoid paying for the consequences of his or her wrongful acts").

This philosophy is perfectly aligned with the purpose of CERCLA. "[T]he twin aims of CERCLA are to cleanup hazardous waste sites and ***impose the costs of such cleanup on parties responsible for the contamination.***" *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005) (emphasis added). CERCLA was enacted at least in part "[s]o, those actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions.'" *United States v. Bestfoods*, 524 U.S. 51, 55-56 (1998) (quoting S. Rep. No. 96-848, pp. 6119, 13, U.S. Code Cong. & Admin. News 1980, p. 6119 (1980)). "Although [the United States Environmental Protection Agency] has several alternative strategies for achieving the statute's objective, each ultimately involves 'forc[ing] polluters to pay for costs associated with remedying their pollution.'" *United States v. Occidental Chem. Corp.*, 200 F.3d 143, 147 (3rd Cir. 1999) (quoting *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257-58 (3rd Cir. 1992)).

It is further recognized that "CERCLA's 'essential purpose of making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created'" is promoted by the collateral source doctrine. *Id.* (quoting *FMC Corp. v.*

Dep't of Commerce, 29 F.3d 833, 843 (3d Cir. 1994)). In addition, the statute contains no rigid rule against overcompensation. To the contrary, "several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation." *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 219 (1994).

C. The Tenth Circuit's Decision Conflicts with this Court's Analysis in *Atlantic Research Corp.*

This Court has recently compared the concept of contribution under CERCLA to the traditional form of contribution commonly applied in tort law. *United States v. Atlantic Research Corp.*, 127 S.Ct. 2331 (2007). In *Atlantic Research*, this Court noted that "[c]ontribution is defined as the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.'" *Id.* at 2338 (quoting Black's Law Dictionary 353 (8th ed. 1999)). This Court also cites the RESTATEMENT (SECOND) OF TORTS § 886A(2) (1979) in its analysis of contribution under CERCLA, and further acknowledges that "[n]othing in § 113(f) suggests that Congress used the term 'contribution' in anything other than this traditional sense." *Id.* at 2339

As demonstrated above, the Tenth Circuit's decision to dismiss the collateral source rule as a creation of "tort law" is inconsistent with the findings of this Court. The collateral source rule is consistently applied outside of the context of tort law. *See* e.g. *Technical Computer Servs., Inc. v. Buckley*, 844 P.2d

1249, 1254 (Colo. App. 1992) ("the common law collateral source rule is equally applicable to contract actions."). The collateral source rule should be applied in the context of a CERCLA contribution or recovery action just as it is in the context of many other claims asserted under federal law.

II. THE TENTH CIRCUIT'S FAILURE TO APPORTION PRIOR SETTLEMENTS AS REQUIRED BY *UNITED STATES V. BURLINGTON N. R. R. CO.* RESULTED IN RESPONDENTS OBTAINING A WINDFALL

Defendants are entitled to a credit against the amount recovered by the plaintiff only to the extent the damages sought are completely common with those giving rise to and resolved by the settlement. If there is a lack of commonality between and among the damages settled and the damages at issue, the settlement must be allocated and apportioned to determine the amount of the offset, if any. Mr. Friedland's prior settlements with USF&G and Travelers included claims separate and distinct from his claims against TIC and GeoSyntec. The District Court should have undertaken the factual inquiry and analysis necessary to allocate and apportion the settlement amounts to those damages, if any, that are common with those claims in the CERCLA action against TIC and GeoSyntec. The District Courts failure to analyze and apportion the settlements to determine what, if any common damages exist was improper.

A. Complete Common Damages are Required for a Total Setoff of a Prior Settlement

Prior to applying any prior settlement to setoff damages in a pending litigation, it is essential that the court first find common damages among the claims settled upon and the damages at issue in the present action. *See* e.g. *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197 (10th Cir. 1988). In *Hess*, the Tenth Circuit held that:

> When a plaintiff receives an amount from a settling party, it is generally credited against the amount recovered by the plaintiff from a non-settling defendant, provided both the settlement and the judgment represent *common damages*. The 'one satisfaction' rule is applicable only where the defendant's conduct resulted in a single injury.

Hess, 861 F.2d at 1208 (emphasis added); *see also United States v. Burlington N. R. R.*, 200 F.3d 679, 698 (10th Cir. 1999) (citing *Hess*, *supra*). Upon finding *complete* common damages among claims, the court did not attempt to allocate the lump-sum settlements with the settling defendants and applied the entire settlement to the damages judgment.

A finding of "common damages" is an essential condition of the "one satisfaction" rule applied in *Hess*. *Id.* at 1208. Courts that have addressed whether a setoff is appropriate first determined whether the party seeking the setoff is liable for *part* or *all* of the claims addressed in the prior settlement. *See* e.g.

Burlington, 200 F.3d 679; *City & County of Denver v. Adolph Coors Co.*, 829 F. Supp. 340 (D. Colo. 1993).

B. Mr. Friedland's Prior Settlements Included Claims Separate and Distinct from Contribution Claims under CERCLA

The common damages analysis has no application in the present case because the prior settlements were based on insurance contracts and not the "single indivisible injury" contemplated in *Hess*. 861 F.2d at 1208. In his insurance coverage action against USF&G, Mr. Friedland alleged and settled claims for investigation, indemnity and defense costs, as well as bad faith trade practices related to costs Mr. Friedland incurred in responding to the Underlying Litigation. In his insurance coverage action against Travelers, Mr. Friedland alleged and settled claims for investigation, indemnity and defense costs related to costs Mr. Friedland incurred in responding to the Underlying Litigation. The settlements resolved all of Mr. Friedland's claims against the named insurers and both settlements also encompassed the value of Mr. Friedland's "buy-back" of his insurance coverage from USF&G and Travelers such that neither insurer owed any future obligations under the insurance policies at issue. Mr. Friedland indemnified USF&G and Travelers against any future claims or actions arising under the policies, consideration for which was necessarily included in the settlements.

In contrast, the present action against TIC-The Industrial Company ("TIC") and GeoSyntec Consultants Inc. f/k/a GeoServices, Inc. ("GeoSyntec")

involves Mr. Friedland's CERCLA contribution claims for recovery of TIC and GeoSyntec's respective shares of the response costs that were due to the release of hazardous substances caused by TIC and GeoSyntec's operations at the Summitville Mine Site. If the prior settlement and the potential damages judgment do not involve complete "common damages," – *i.e.*, TIC and GeoSyntec could not be held liable for Mr. Friedland's investigation and defense costs, the value of Mr. Friedland's "buy-back" of his insurance coverage, or the bad faith claims against USF&G – a complete setoff cannot apply. The burden of proving that a settlement and a subsequent judgment represent common damages, so that the respondent would receive an impermissible double-recovery if setoff were not allowed, rests on the party seeking the setoff credit. *Boyett v. Keene Corp.*, 815 F. Supp. 204, 209 (E.D. Tex. 1993); *see also Ruhlmann v. Smith*, 323 F. Supp. 2d 356, 368 (N.D. N.Y. 2004)

C. Apportionment of Mr. Friedland's Prior Settlements is Required to Prevent Manifest Injustice

Courts routinely engage in allocation analyses in CERCLA contribution actions. *See* e.g. *Burlington*, 200 F.3d at 697, 698. Courts determine whether harm is divisible and, as in *Burlington*, also take on the task of apportioning settlement amounts. *Id.* at 698; *see also Atlantic Richfield Co. v. Am. Airlines, Inc.*, 836 F. Supp. 763 (N.D. Okla. 1993); *Hidden Lakes Dev., LP v. Allina Health Sys.*, 2004 WL 2203406, at *11 (D. Minn. Sept. 27, 2004); *Adolph Coors Co.*, 829 F. Supp. 340; *Colo. Sch. of Mines v. AK Steel Corp.*, 2001 WL 34041780, at *2 (D. Colo. Sept. 26, 2001). This allocation

necessarily involves questions of fact, such that summary judgment is not appropriate. *See Raytheon Aircraft Co. v. United States*, 2007 WL 4300221, *5 (D. Kan. Dec. 8, 2007). At most, only a partial setoff may apply to that portion of the settlements relating to indemnity for response costs, but that will first require an apportionment of the settlements, as the Tenth Circuit properly instructs in other cases. *Burlington*, 200 F.3d at 698; *see also Adolph Coors Co.*, 829 F. Supp. at 347.

The liabilities of TIC and GeoSyntec for CERCLA response costs due to harm caused by their operations and activities at the Summitville Mine Site cannot be extinguished simply because the prior settlements between Mr. Friedland and his insurers did not expressly allocate between response and defense costs. The Tenth Circuit's decision here undermines the principles of joint and several liability inherent in CERCLA's critical and well-established remedial scheme. *Burlington*, 200 F.3d at 696. Further, as noted by the Ninth Circuit,

> [o]ne of the goals of CERCLA was to affix the ultimate cost of cleaning up these disposal sites to the parties responsible for the contamination. To leave one party shouldering the entire cost of investigation and remediation while another *rides for free* frustrates this goal, rather than ensuring that those who caused the contamination *pay their fair share* of the costs associated with the clean-up.

Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1185 (9th Cir. 2000) (internal quotations omitted). Nothing in

CERCLA or *Hess* advocates the windfall to TIC or GeoSyntec and penalty to Mr. Friedland that has resulted from the full setoff and dismissal on summary judgment.

Additionally, even if Mr. Friedland could have extracted express allocations from his insurers, prior to a setoff, the agreements would have been subject to a reasonableness inquiry. *See Owen v. United States*, 713 F.2d 1461, 1466 (9th Cir. 1983) (the presumption that parties have reasonably allocated a settlement amount should be preserved for a settlement by parties with truly adverse interests in the allocation); *see also Colo. Sch. of Mines.*, 2001 WL 34041780, at *2 (court reviewed "good faith" of pending settlements between plaintiff and settling PRPs in CERCLA contribution action); *Vitkus v. Beatrice Co.*, 127 F.3d 936, 941, 944 (10th Cir. 1997) (court undertook reasonableness inquiry of insurance settlement in non-CERCLA action to determine whether the allocation "reasonably reflected the [insured's] potential exposure in the underlying litigation").

As noted above, the Tenth Circuit erred in determining TIC and GeoSyntec were entitled to a setoff of Mr. Friedland's prior settlements. The record clearly illustrates a lack of common damages among the amounts encompassed in Mr. Friedland's settlements with his insurers and the CERCLA contribution claims against TIC and GeoSyntec. Additionally, because an insurer's duty to defend is broader than its duty to indemnify, *Hecla Mining Co. v. N. H. Ins. Co.*, 811 P.2d 1083 (Colo. 1991), the Tenth Circuit erred in refusing to engage in settlement allocation to determine the amount of the settlement funds received by

Mr. Friedland from his insurers applied to the liabilities of TIC and GeoSyntec for CERCLA response costs. The Tenth Circuit's error in reaching such a conclusion that could jeopardize CERCLA's mandate must be corrected to avoid future confusion in effecting CERCLA's fundamental purpose.

CONCLUSION

The Petition for Certiorari should be granted because the United States Court of Appeals for the Tenth Circuit erred in interpreting CERCLA §§ 107 and 113(f), by failing to apply the collateral source rule and by refusing to apportion Mr. Friedland's prior settlements.

Respectfully submitted:
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(any footnotes trail end of each document)

No. 08-1042
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT M. FRIEDLAND,
Plaintiff - Appellant,
v.
TIC - THE INDUSTRIAL COMPANY;
GEOSYNTEC CONSULTANTS INC., f/k/a
Geoservices, Inc.,
Defendants - Appellees.

UNISYS CORPORATION, a Delaware corporation,
Amicus Curiae.

May 29, 2009, Filed

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. (D. Ct. No. 1:04-CV-01263-REB-KLM).

COUNSEL: Perry L. Glantz (John D. Fognani and Fritz W. Ganz, with him on the briefs), Fognani & Faught, PLLC, Denver, Colorado, appearing for Appellant.

Terence M. Ridley, Wheeler Trigg Kennedy, LLP, Denver, Colorado, and Colin C. Deihl, Faegre & Benson, LLP, Denver, Colorado (Lamar F. Jost, Wheeler Trigg Kennedy, LLP, Denver, Colorado; Delmar R. Ehrich and Bruce Jones, Faegre & Benson LLP, Denver, Colorado, with them on the brief), appearing for appellees.

Raymond B. Ludwiszewski, Peter E. Seley, and Michael K. Murphy, Gibson, Dunn & Crutcher, LLP, Washington, DC, filed an amicus curiae brief on behalf of Unisys Corporation.

Before TACHA, BALDOCK, and O'BRIEN, Circuit Judges.

OPINION

TACHA, Circuit Judge.

Plaintiff-appellant Robert M. Friedland filed this contribution action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") § 113(f), 42 U.S.C. § 9613(f), against defendants-appellees The Industrial Company ("TIC") and GeoSyntec Consultants Inc. ("GeoSyntec"). The district court entered summary judgment in favor of the defendants-appellees based on its determination that Mr. Friedland has already recouped all of his recoverable costs from other entities and therefore has no damages to recover in this case. Mr. Friedland appeals. We have jurisdiction under 28 U.S.C. § 1291 and AFFIRM.

I. BACKGROUND

Mr. Friedland is a former director and president of Summitville Consolidated Mining Company, Inc. ("SCMCI"). From about 1984 to 1992, SCMCI operated a large gold mine facility in the Summitville Mining District near Del Norte, Colorado ("the Summitville mine"). TIC helped construct the Summitville mine. GeoSyntec provided quality assurance regarding the

mine's heap leaching system, a process in which a cyanide solution is sprayed on gold-bearing ore to precipitate the gold.

In December 1992, SCMCI declared bankruptcy and abandoned the mine. That same month, the United States Environmental Protection Agency ("EPA") took over management of the Summitville mine and instituted response actions to address actual or threatened releases of contaminated water from the mine into the environment. In 1996, after an investigation of numerous potentially responsible parties ("PRPs"), the United States and the State of Colorado sued Mr. Friedland under CERCLA § 107, 42 U.S.C. § 9607, to recover their response costs. As part of that lawsuit ("the cost-recovery action"), Mr. Friedland filed a third-party contribution complaint under CERCLA § 113, 42 U.S.C. § 9613, against twelve separate PRPs, including an entity called Industrial Constructors Corp. ("ICC"). He did not name TIC or GeoSyntec in that complaint. In December 2000, Mr. Friedland settled the claims brought against him by the United States and Colorado for $ 20,723,181. Mr. Friedland spent approximately $ 28 million on legal fees in the cost-recovery action.

Prior to that settlement, Mr. Friedland initiated at least two lawsuits relevant to this appeal. In 1999, he sued ICC and United States Fidelity & Guaranty Company ("USF&G") in Montana state court. ICC had performed work on the Summitville mine from 1987-1990 and was contractually bound to indemnify SCMCI against losses caused by ICC, and to reimburse SCMCI for settlements it had to pay as a result of those losses. USF&G had issued insurance policies covering Mr.

Friedland and ICC for the contractual liabilities undertaken by ICC. In his complaint, Mr. Friedland contended that ICC was obligated to pay all of his costs of defense, investigation, and legal liabilities, including all sums spent in settlement, in connection with the cost-recovery action. He further claimed that USF&G was obligated under the insurance policies it had issued to provide a defense and indemnification for the claims raised in the cost-recovery action.

Approximately nine months after Mr. Friedland, the United States, and Colorado reached the $ 20,723,181 settlement agreement in the cost-recovery action, Mr. Friedland and ICC entered into a confidential settlement agreement as to Mr. Friedland's third-party CERCLA contribution claim and to the claims he raised in the Montana state proceeding. ICC agreed to pay a certain sum[1] to Mr. Friedland and further agreed (because ICC had filed for bankruptcy) to assign him the rights to all insurance claims ICC might have against USF&G. With all claims against ICC resolved, Mr. Friedland amended his Montana state complaint to name only USF&G as a defendant. USF&G subsequently settled that suit for a specific dollar amount in December 2002.[2]

In the second lawsuit relevant to this appeal, in June 2002 Mr. Friedland sued The Travelers Indemnity Company ("Travelers") in Colorado state court for "a declaration that Travelers is fully obligated to pay the costs of investigation, defense, and liability that Mr. Friedland has incurred in connection with the legal actions brought against him claiming or asserting property damage and other alleged injuries at the Summitville Mine Site." Mr. Friedland alleged that he

was a named insured under a Travelers liability policy covering sums he was legally obligated to pay because of property damage, as well as costs he incurred to defend himself. Mr. Friedland and Travelers settled the suit in October 2005.

Mr. Friedland initiated this CERCLA contribution action against TIC and GeoSyntec in June 2004. In response to an interrogatory during discovery, Mr. Friedland stated that he sought contribution for the $ 20,723,181 he agreed to pay to settle the cost-recovery action brought against him by the United States and Colorado. He also stated that he had already recovered more than that amount from other sources, including the USF&G and Travelers settlements. As a result of this disclosure, the defendants moved for summary judgment, arguing that because Mr. Friedland had already recovered from others amounts exceeding the payment he made to the United States and Colorado, he has no damages and no right to contribution under CERCLA § 113(f) as a matter of law. Mr. Friedland advanced two theories in response. He contended that the collateral source rule prohibits crediting the defendants in the amount of the settlement money he received from USF&G and Travelers. Alternatively, he urged the district court to allocate the settlement money to his $ 28 million defense costs, rather than the $ 20,723,181 settlement amount. In this way, Mr. Friedland argued that he still has recoverable damages. The district court rejected both arguments and granted the motion. Mr. Friedland maintains the same two positions on appeal.

II. DISCUSSION

A. The Collateral Source Rule

Derived from the common law, the collateral source rule posits that "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." Restatement (Second) of Torts § 920A(2) & cmt. d (1979). The rule thus permits an injured plaintiff to recover more than the damages he has suffered as the result of an injury:

> the common law did not require setoffs against damage awards. Rather, plaintiffs were allowed to recover the full damages awarded against defendants even though the plaintiffs also received compensation from collateral sources. This principle of double recovery, known as the collateral source rule, provided that compensation or indemnity received by an injured party from a collateral source, wholly independent of the wrongdoer and to which he has not contributed, will not diminish the damages otherwise recoverable from the wrongdoer. . . . Subject to . . . limited exceptions, courts would not reduce a judgment because the plaintiff had received compensation from a collateral source even if the result was that the plaintiff recovered twice for a single loss.
>
> The purpose of the collateral source rule was to prevent the defendant from receiving credit for such compensation and thereby reduce the amount payable as damages to the injured party. To the extent that either party received a windfall, it was considered more just that the benefit be realized by the plaintiff in the form of

> double recovery rather than by the tortfeasor in the form of reduced liability.

Van Waters & Rogers, Inc. v. Keelan, 840 P.2d 1070, 1074 (Colo. 1992) (quotations and citations omitted). *See also Green v. Denver & Rio Grande W. R.R. Co.*, 59 F.3d 1029, 1032 (10th Cir. 1995) ("The rationale for the rule is [that] . . . public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an independent source."). Thus, courts have applied the rule when the injured plaintiff has been compensated by, for example, social security disability payments or unemployment compensation, *see id.*, or by the plaintiff's insurance. *See Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1341 (10th Cir. 1998).

Turning to the case before us, it is far from clear that this common-law tort principle applies to claims brought pursuant to CERCLA, a comprehensive federal statute that addresses liability for environmental cleanup costs. Indeed, the section of CERCLA that governs contribution actions clarifies that "[s]uch claims [for contribution] . . . shall be governed by Federal law." CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). But even assuming that CERCLA generally contemplates application of the collateral source rule, it is clearly inapplicable in the specific context of a § 113(f) contribution action by a PRP such as Mr. Friedland. CERCLA provides for two types of actions to recoup environmental cleanup costs: cost-recovery actions under § 107(a), 42 U.S.C. § 9607(a), and contribution actions under § 133(f), 42 U.S.C. § 9613(f). *Young v. United States*, 394 F.3d 858, 862 (10th Cir.

2005). In a contribution action, a person who has settled a cost-recovery claim with the government (as Mr. Friedland has) may seek contributions from other PRPs. *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1194 (10th Cir. 1997); CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). We have explained that a claim for contribution is a claim "by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make . . . ." Sun Co., Inc., 124 F.3d at 1190 (quotations omitted). Thus, a CERCLA contribution action is not a personal injury action by an innocent plaintiff. Instead, it is a claim between two or more culpable tortfeasors, and the policy underlying the collateral source rule--to provide the innocent party with the benefit of any windfall--is simply not advanced in such cases.

At least one other federal court has reached the same conclusion on materially indistinguishable facts. In *Basic Management Inc. v. United States*, 569 F. Supp. 2d 1106 (D. Nev. 2008), the plaintiffs filed a CERCLA contribution claim after they agreed to pay $ 22 million in cleanup costs to the state of Nevada. The plaintiffs' insurance policies, however, covered nearly all of those costs, leaving the plaintiffs with only a relatively small amount of out-of-pocket expenses. *Id.* at 1112. Nonetheless, the plaintiffs argued that the collateral source rule precluded the defendants from offsetting their CERCLA liability in the amount of the insurance proceeds. *Id.* at 1123. The court disagreed. Distinguishing tort cases in which the collateral source rule applies, the court explained that "CERCLA contribution actions are not injury actions in which the injured party is seeking compensation for damages to

be made whole again." *Id.* at 1123-24. The court went on:

> In other words, Plaintiffs have not been damaged and are not "entitled" to money as a damaged party; but rather, Plaintiffs can only receive reimbursement for the costs they expended beyond their share of actual responsibility for the environmental damage. There is an actual dollar amount associated with those costs, and in this case, almost all of those costs have been paid directly by Plaintiffs' insurers, and without further right of subrogation in the insurers. In other words, no party or potential party here has incurred a cost as a PRP for which they could seek "contribution" from another PRP. Allowing Plaintiffs to recover those costs "again" from Defendants would in essence allow Plaintiffs to profit from their own and prior contamination of the site simply because they are in the subsequent chain of title. The purpose of the Contribution element of CERCLA was to reallocate the remedial cost to those who were ultimately responsible for the pollution, not to provide a windfall recovery for parties who happen to be in the chain of title.

Id. at 1124. Thus, the court refused to apply the collateral source rule. *Id.* at 1125.[4]

Moreover, permitting a CERCLA contribution-action plaintiff to recoup more than the response costs he paid out of pocket flies in the face of CERCLA's mandate to apportion those costs equitably among liable parties.

See CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."). Every federal court that has addressed the issue has reached the same conclusion, either with or without reference to the collateral source rule. *See, e.g., K.C.1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1018 (8th Cir. 2007) ("Because the settlement credits [from other PRPs to the plaintiff] present a significant allocation factor [under § 9613(f)(1)] . . . the district court should have exercised its discretion to consider them when calculating the amount of the judgment."); *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1189 (9th Cir. 2000) ("[O]ne equitable factor is preventing someone from recovering for the same harm twice."); Basic Mgmt. Inc., 569 F. Supp. 2d at 1125 (refusing to apply the collateral source rule because "[e]quity and common sense . . . dictate that Plaintiffs cannot recover the remediation costs paid for by their insurance policies."); *Vine St., LLC v. Keeling*, 460 F. Supp. 2d 728, 765 (E.D. Tex. 2006) (refusing to apply the collateral source rule, reasoning that because "the Court has a broad duty to consider facts bearing on the proper equitable allocation of response costs, the monies [the plaintiff] has already recovered are relevant."); *United States v. Davis*, 31 F. Supp. 2d 45, 64 (D.R.I. 1998) ("There is nothing 'equitable' about [the] kind of an allocation" that permits the plaintiff "to recover a portion of the costs for which it already has been or will be compensated."); *Raytheon Aircraft Co. v. United States*, 2007 U.S. Dist. LEXIS 89671, 2007 WL 4300221, at *3 (D. Kan. Dec. 5, 2007) (following *K.C.1986*, *Boeing*, *Davis*, and *Vine Street* and refusing to apply the collateral source rule).[4]

The two primary cases Mr. Friedland cites in support of his argument do not undermine this conclusion. In *Louisiana Department of Transportation v. Kansas City Southern Railway*, 846 So.2d 734 (La. 2003), the Louisiana Department of Transportation and Development ("DOTD") cleaned up a site that had been polluted by Kansas City Southern Railway. The federal government reimbursed the DOTD for approximately 90% of the remediation costs it incurred cleaning the site. *Id.* at 736. Thereafter, DOTD sued Kansas City Southern Railway under the Louisiana Environmental Quality Act ("LEQA") to recover the entire cleanup cost. *Id.* Emphasizing the policy behind the collateral source rule, *id.* at 740-44, the Louisiana Supreme Court held that the rule permitted DOTD to seek the entire cleanup cost from Kansas City Southern Railway rather than only the 10% it had not recouped from the federal government: "We . . . hold that the collateral source rule applies in cases arising under the LEQA, *at least where a damaged party is seeking reimbursement only for remediation expenses.*" *Id.* at 740 (emphasis added).

Similarly, in *Town of East Troy v. Soo Line Railroad*, 653 F.2d 1123 (7th Cir. 1980), the town of East Troy cleaned up ground water that had been polluted by Soo Line Railroad Company. The town paid for the cleanup costs with federal grant money. *Id.* at 1126. Thereafter, the town sued Soo Line under a Wisconsin nuisance statute to recover the full amount of the town's cleanup costs. *Id.* The Seventh Circuit affirmed the district court's conclusion that under Wisconsin law, the collateral source rule permitted the town to seek the entire amount of the cleanup. *Id.* at 1132.

Louisiana Department of Transportation and Town of East Troy are distinguishable in at least two significant respects. First, the plaintiffs in those cases were innocent parties, not PRPs seeking contribution from other PRPs. Indeed, the court in *Louisiana Department of Transportation* specifically limited its holding to cases in which the plaintiff is the injured party seeking reimbursement for remediation costs. Second, the causes of action in both cases arose under state law, not CERCLA. As we explained, CERCLA contribution actions are governed by federal law and permit the district court to consider equitable factors in allocating response costs. Those factors include a prior payment to the contribution plaintiff. Thus, we disagree with Mr. Friedland that these cases have any bearing on the issue before us and hold that the district court did not err in refusing to apply the collateral source rule in this CERCLA contribution action.

B. Common Damages and Settlement Allocation

Relying on *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197 (10th Cir. 1988) and *United States v. Burlington Northern Railroad*, 200 F.3d 679 (10th Cir. 1999), Mr. Friedland argues that the district court erred in reducing his damages by the full amount of the USF&G and Travelers settlements because those settlements do not represent damages in common with the ones at issue in this case. We disagree.

In *Hess Oil*, Hess Oil sued UOP and other defendants after a fire caused several million dollars in damage to one of Hess Oil's refineries. 861 F.2d at 1199. Defendants other than UOP settled with Hess Oil for $ 1.5 million. *Id.* at 1207. After a jury verdict against

UOP, the district court credited it with the $ 1.5 million settlement and required it to pay only the remaining balance on Hess Oil's damages. *Id.* at 1199, 1206-07. We rejected Hess Oil's argument on appeal that UOP was not entitled to a credit. *Id.* at 1209. We reasoned that under the "one satisfaction rule," when the conduct of multiple defendants results in a single injury with common damages, and one of the defendants settles with the plaintiff, the amount of the settlement is credited against the amount that may be recovered from the non-settling defendants. *Id.* at 1208. We found a single injury and common damages in that case because the settlement agreement referred to all damages and all causes of action; it did not expressly apportion damages to specific claims. *Id.*

We reinforced this proposition in *Burlington Northern.* The United States sued a wood treatment facility, BIC, to recover cleanup costs on a 64-acre tract of land. Burlington Northern, 200 F.3d at 681, 683. During the suit, the United States learned that another company, a predecessor of Burlington Northern Railroad, had owned 17.5 acres of the tract during the time of the polluting activities. *Id.* at 687. Thus, the United States added Burlington as a defendant. *Id.* Thereafter, the court entered summary judgment against the first defendant, BIC, concluding that it was liable for all response costs for the entire 64-acre tract. *Id.* After a bench trial on Burlington's liability, the court found Burlington liable only for the costs to clean up the 17.5-acre portion of the tract. *Id.* at 687-88, 695-96. It reasoned that there were two separate and distinct areas of contamination in the tract, and that Burlington only owned one of those areas. After the judgment, BIC settled with the United States for $ 10.7 million. *Id.* at

696. Although the settlement agreement did not allocate cleanup costs between the two distinct polluted areas, the district court ruled that the harm was divisible (that is, not common to both defendants) and thus *Hess Oil* was distinguishable. *Id.* at 698. The court accordingly credited Burlington's liability with only a portion--rather then the full amount--of the $ 10.7 million that the United States had received from BIC.

Thus, under Hess Oil and Burlington Northern, if Mr. Friedland's injury and the damages he alleges in this lawsuit are the same as those addressed by the USF&G and Travelers settlements, then the defendants are entitled to a full credit in the amount of the settlements.[5] We agree with the district court that this is the case. Mr. Friedland admitted as much in his responses to the defendants' interrogatories. When asked to "[i]dentify Your costs, damages, injuries or expenses arising from or caused by the Cost Recovery Action for which You seek contribution in the lawsuit," Mr. Friedland responded:

> The "costs, damages, injuries or expenses caused by the Cost Recovery Action" for which Plaintiff seeks contribution in this lawsuit are the amounts he paid to settle the CERCLA claims against him by the State of Colorado and the United States, *i.e.*, $ 20,288,081, and the additional response costs Plaintiff incurred when he paid $ 435,100 for the Conceptual Remediation Plan [for a total of $ 20,723,181].

And when the defendants asked Mr. Friedland to identify all payments he had received related to his "costs, damages, injuries or expenses arising from or

caused by the Cost Recovery Action for which You seek contribution in the lawsuit,"--costs which Mr. Friedland himself had admitted extended only to the $ 20,723,181 settlement amount--he disclosed that he had received the USF&G and Travelers settlements. He further characterized those settlements as resolving his "claims for *damages* he sustained in the Cost Recovery Action," which we interpret as referencing the $ 20,723,181 settlement figure. (Emphasis added.) Thus, by Mr. Friedland's own admissions, the USF&G and Travelers settlements remedied the $ 20,723,181 he incurred in settling the cost-recovery action with the United States and Colorado, and this contribution action reasserts the same injury and resultant damages.

In an apparent attempt to create divisible harm where it otherwise does not exist, Mr. Friedland also contended in his interrogatory responses that a substantial portion of the amounts recovered in the USF&G and Travelers settlements were attributable to his $ 28 million in defense costs and not to the $ 20,723,181 settlement amount. The USF&G and Travelers settlement agreements, however, do not expressly or impliedly allocate the settlement money toward amounts Mr. Friedland paid in settling the underlying litigation on the one hand and for legal defense costs on the other. In *Hess Oil*, we held that the plaintiff's failure to allocate costs in this manner was fatal to its contention that the defendant was not entitled to a credit in the settlement amount. Hess Oil, 861 F.2d at 1209 ("If [Hess Oil] wanted to have any particular application of its settlement with the settling defendants [allocated] towards UOP's liability, it should have specifically stipulated in the settlement

documents what allocations of damages were applicable to each cause of action.").

In the district court, Mr. Friedland's expert witness submitted an opinion concerning which portions of the USF&G and Travelers settlements were paid to indemnify him and which portions were paid for defense costs. Mr. Friedland argues that the court rejected that testimony without first performing the "gatekeeping" function required by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *See Goebel v. Denver & Rio Grande* W. R.R., 215 F.3d 1083, 1087 (10th Cir. 2000) ("[The] gatekeeper function requires the judge to assess the reasoning and methodology underlying the expert's opinion, and determine whether it is scientifically valid and applicable to a particular set of facts." (citing Daubert, 509 U.S. at 592)). We disagree. It is apparent from the district court's order that it did not refuse to consider the expert opinion based on deficiencies in the expert's qualifications or methodology. Rather, the court simply explained that "[g]iven the silence of the settlement agreements regarding allocation, this testimony is far too speculative to be admissible and consequently, does not create a genuine issue of material fact for trial." *Friedland v. The Indus. Co.*, 2008 U.S. Dist. LEXIS 4076, 2008 WL 185693, at *2 n.4 (D. Colo. Jan. 18, 2008). This was not an abuse of discretion. *See Eastridge Dev. Co. v. Halpert Assocs., Inc.*, 853 F.2d 772, 782-83 (10th Cir. 1988) (trial court did not abuse its discretion in excluding expert testimony regarding the allocation of settlement money to particular claims when the settlement agreement did not contain an express allocation; proposed testimony was "tentative and speculative").

Finally, Mr. Friedland suggests that the district court's conclusion rested on the erroneous view that USF&G and Travelers are joint tortfeasors. The district court pointed out that attorneys' fees are not recoverable in CERCLA contribution actions, *see* 42 U.S.C. § 9607(a)(4); *Key Tronic Corp. v. United States*, 511 U.S. 809, 817-19, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (1994), and that settling parties should therefore make any variance from the statute absolutely clear. We agree that this statement is misplaced, as Mr. Friedland did not sue USF&G and Travelers under CERCLA. A review of the entire order, however, clarifies that this lone misstatement was harmless. The district court had already determined that Mr. Friedland's "claims are not divisible, and the general rule of [*Hess Oil*], permitting defendants full credit for the amount of any settlement, applies in the absence of an express allocation in the settlement agreements themselves." *Friedland*, 2008 U.S. Dist. LEXIS 4076, 2008 WL 185693, at *2. As we explained, that conclusion is correct, and any further commentary was simply superfluous.

III. CONCLUSION

The district court correctly concluded that the collateral source rule does not apply in this CERCLA contribution action. The court also properly determined that the alleged injury and damages in this lawsuit are the same as those addressed in the USF&G and Travelers settlements. We therefore AFFIRM the entry of summary judgment against Mr. Friedland. We GRANT the appellees' motion to file their response brief under seal and Mr. Friedland's motion to file his reply brief under seal.

Footnote(s)

1The amount of this sum is subject to a confidentiality agreement and was filed under seal with this court.

2As with the ICC settlement, the amount of the USF&G settlement is subject to a confidentiality agreement and was filed under seal with this court.

3We are unaware of any court that has applied the collateral source rule to a claim for contribution, even outside the CERCLA context.

4Mr. Friedland argues that *Raytheon Aircraft* and *Vine Street* fail to distinguish between payments from insurance policies and private settlements from other PRPs. Although Mr. Friedland is correct that the source of the payment is relevant to whether the collateral source rule applies, the source of the payment is not relevant in the context of § 9613(f)(1)'s instruction to allocate response costs equitably. What matters is that the contribution plaintiff has recovered some or all of its response costs; the identity of the entity providing the recovery is irrelevant

5We recognize that *Hess Oil* and *Burlington* present a different procedural posture than the one we face in this appeal. Those cases involved a single lawsuit against multiple defendants, whereas Mr. Friedland recovered in two previous suits against two different defendants and now seeks contribution against other defendants. We consider this distinction immaterial. *Hess Oil* and *Burlington Northern* center on the plaintiff's right to recover only to the extent of his damages, which is the sole issue in this appeal and

which can arise in a variety of procedural circumstances.

United States District Court,
D. Colorado.

Robert M. **FRIEDLAND**, Plaintiff,
v.
TIC-THE INDUSTRIAL COMPANY; and Geosyntec Consultants Inc., f/k/a Geoservices, Inc., Defendants.

Civil Action No. 04-cv-01263-REB-KLM.

Jan. 18, 2008.

Perry L. Glantz, Fognani & Faught, PLLC, Denver, CO, for Plaintiff.

Colin Christopher Deihl, Faegre & Benson, LLP, Steven Matthew Kelso, Terence M. Ridley, Marian Lee, Wheeler Trigg Kennedy, LLP, Denver, CO, Delmar R. Ehrich, Faegre & Benson, Minneapolis, MN, Paul J. Sanner, Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP, San Francisco, CA, for Defendants.

ORDER GRANTING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON DAMAGES

BLACKBURN, Judge.

The matter before me is **Defendants' Joint Motion for Summary Judgment on Damages** [# 153], filed October 30, 2006. I grant the motion.

I. JURISDICTION

I have subject matter jurisdiction pursuant to 28 U.S.C.

§ 1331 (federal question).

II. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED.R.CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U .S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Farthing v. City of Shawnee*, 39 F.3d 1131, 1135 (10th Cir.1994). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Farthing*, 39 F.3d at 1134.

A party which does not have the burden of proof at trial must show the absence of a genuine fact issue. *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir.1994), *cert. denied*, 115 S.Ct. 1315 (1995). Once the motion has been properly supported, the burden shifts to the nonmovant to show, by tendering depositions, affidavits, and other competent evidence, that summary judgment is not proper. *Id.* at 1518. All the evidence must be viewed in the light most favorable to the party opposing the motion. *Simms v. Oklahoma ex rel Department of Mental Health and Substance Abuse Services*, 165 F.3d 1321, 1326 (10th Cir.), *cert. denied*, 120 S.Ct. 53 (1999).

III. ANALYSIS

Plaintiff, a former director and officer of the Summitville Consolidated Mining Company, was sued in a cost recovery action related to cleanup of the Summitville Mine Superfund Site. That cost recovery action, *United States v. Friedland*, Civil Action No. 96-cv-01213-EWN-OES (D.Colo.), ultimately was resolved by consent decree, pursuant to which plaintiff agreed to pay $20,723,181 in recovery costs.

While that case was still pending, plaintiff and others filed suit in Montana state court against Industrial Constructors Corp. ("ICC") and its insurer, United States Guaranty and Fidelity Corp. ("USF & G"), among others, seeking indemnification pursuant to a contract for work performed by ICC at the site. Not long after the cost recovery action was resolved, the plaintiffs in the Montana suit settled their claims against ICC. As part of that agreement, ICC assigned its claims against its insurers, including USF & G, to plaintiff. Plaintiff subsequently settled the assigned claims against USF & G. In 2002, plaintiff initiated another action, under his employer's liability insurance policy, against The Travelers Indemnity Company and related entities ("Travelers") in Colorado state district court. That case also was ultimately settled.[FN1] It is undisputed that as a result of the USF & G and Travelers settlements, plaintiff has recovered more than he agreed to pay in recovery costs.[FN2]

In the instant suit, plaintiff seeks contribution from defendants pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9613(f)(1) & (f)(3)(B). CERCLA provides, in relevant part, that the settlement of claims for contribution thereunder "does

not discharge any of the other potentially liable persons ...., but it reduces the potential liability of the others by the amount of the settlement." *Id.* § 9613(f)(2). *See also United States v. Burlington Northern Railroad Co.*, 200 F.3d 679, 697 (10th Cir.1999). Defendants now move for summary judgment arguing that, having received via settlement more than he was ordered to pay in damages, plaintiff is entitled to no further recovery. Plaintiff does not dispute that defendants are entitled to credit for some portion of the settlements, counters that the amounts he recovered should be allocated between response costs and legal defense costs and that, given such allocation, he still has compensable damages as against these defendants.

The parties agree that neither the Travelers nor the USF & G settlement makes any express or implied allocation between indemnification for amounts plaintiff agreed to pay in the cost recovery action, on the one hand, and legal defense costs, on the other. Generally, a party can insist on a particular allocation of settlement proceeds as against a non-settling party only if it is "specifically stated in the settlement documents what allocations of damages were applicable to each cause of action." *Hess Oil Virgin Island Corp. v. UOP, Inc.*, 861 F.2d 1197, 1209 (10th Cir.1988). In the absence of such specific language, the non-settling party is entitled to full credit for the entire amount of the settlement. *Id.* On the other hand, if the harm to which the settlement is directed is divisible, settlement amounts may be allocated accordingly even in the absence of specific language in the settlement agreement. *Burlington Northern*, 200 F.3d at 698. *See generally*, RESTATEMENT (SECOND) OF TORTS § 433A ("Damages for harm are to be apportioned among two

or more causes where: (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm. Damages for any other harm cannot be apportioned among two or more causes.").

There is absolutely no indication that the settlement amounts plaintiff received are attributable to divisible harms in the sense contemplated by *Burlington Northern*.[FN3] Plaintiff argues that the case parallels *Burlington Northern* because his pleadings in the Travelers and USF & G lawsuits made separate claims for indemnification of response costs and recovery of defense costs. Plaintiff cites no authority and does not further expound or expatiate this "just so" argument, but it fails as a matter of simple logic. Without question, plaintiff's claim for defense costs arose proximately and directly from his liability for response costs. The two could not have been other than inextricably intertwined. Thus, plaintiff's claims are not divisible, and the general rule of *Hess Oil Virgin Island Corp.*, permitting defendants full credit for the amount of any settlement, applies in the absence of an express allocation in the settlement agreements themselves. [FN4]

My conclusion in this regard is bolstered by the recognition that contribution under CERCLA is available only for "necessary costs of response," *see* 42 U.S.C. § 9607(a)(4), and not for attorney fees or costs associated with defending the original litigation, *see Key Tronic Corp. v. United States*, 511 U.S. 809, 817-19, 114 S.Ct. 1960, 1966-67, 128 L.Ed.2d 797 (1994); *Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 571 (10th Cir.1996).[FN5] Of course, a party may settle on terms other than those permitted by statute.

Nevertheless, when the statute sued under expressly excludes recovery of defense costs, a settling party would be well-advised to ensure that his settlement agreement makes the intended variance from the statute absolutely pellucid.[FN6]

Plaintiff argues in the alternative that the collateral source rule prohibits me from crediting defendants with any insurance payments received by him. I wholeheartedly disagree. CERCLA contribution actions such as this one are governed by federal law. 42 U.S.C. § 9613(f)(1). Despite the fact that the collateral source rule has been applied under federal law in other contexts, *see Stanley v. Bertram-Trojan, Inc.*, 868 F.Supp. 541, 543 (S.D.N .Y.1994), it has never been applied in the context of a CERCLA action, *see Raytheon Aircraft Co. v. United States*, 2007 WL 4300221 at *4 (D.Kan. Dec. 8, 2007) (slip op.) (citing *Vine Street, LLC v. Keeling ex. rel. Estate of Keeling*, 460 F.Supp.2d 728, 765 (E.D.Tex.2006)). Nor is it likely that it will be, considering that the collateral source rule derives from tort law, whereas CERCLA does not. *See Young v. United States*, 394 F.3d 858, 862 (10th Cir.2005) ("CERCLA is not a general vehicle for toxic tort claims.").

In sum, plaintiff has not shown a genuine issue of material fact for trial with respect to damages. The settlement agreements into which plaintiff entered are attributable to common, indivisible harms and contain no express allocation as between recovery costs and defense costs. Accordingly, defendants are entitled to full credit for the amount of the settlements. Because those settlements collectively account for more than plaintiff agreed to pay out in recovery costs, he has no

compensable damages to recover as against these defendants.

THEREFORE, IT IS ORDERED as follows:

1. That **Defendants' Joint Motion for Summary Judgment on Damages** [# 153], filed October 30, 2006, is **GRANTED;**

2. That plaintiff's claims against defendants for contribution are **DISMISSED WITH PREJUDICE;**

3. That judgment **SHALL ENTER** in favor of defendants, TIC-The Industrial Company and GeoSyntec Consultants, Inc., f/k/a Geoservices, Inc., and against plaintiff, Robert M. Friedland, as to all claims and causes of action asserted herein;

4. That all other pending motions in this lawsuit are **DENIED AS MOOT,** including, but not limited to,

(a) **Defendant GeoSyntec's Motion for Summary Judgment** [# 41], filed November 18, 2005;

(b) **Defendant TIC-The Industrial Company's Motion for Summary Judgment** [# 62], filed February 8, 2006;

(c) **GeoSyntec's Motion To Strike Certain Exhibits To Plaintiff's Response in Opposition to Motion for Summary Judgment** [# 76], filed February 22, 2006;

(d) **Notice of Errata and Motion To Substitute New Exhibit 10 to Plaintiff's Brief in Response to GeoSyntec's Motion for Summary Judgment** [# 86],

filed March 13, 2006;

(e) **Robert M. Friedland's Motion To Supplement the Record Regarding Defendant GeoSyntec Consultants Inc.'s Motion for Summary Judgment** [# 148], filed October 27, 2006;

(f) **Robert M. Friedland's Motion To Supplement the Record Regarding Defendant TIC-The Industrial Company's Motion for Summary Judgment** [# 149], filed October 27, 2006;

(g) **Plaintiff Robert Friedland's Motion for Summary Judgment Regarding Plaintiff's CERCLA Liability** [# 150], filed October 30, 2007;

(h) **Plaintiff Robert Friedland's Motion and Memorandum for Partial Summary Judgment that Mr. Friedland's CERCLA Response Costs for Government Directed Remediation Were Consistent with the National Contingency Plan** [# 152], filed October 30, 2006;

(I) **Defendant TIC-The Industrial Company's Motion To Remove Confidential Designation from Travelers and USF & G Settlement Agreements (Filed Under Seal)** [# 200], filed January 3, 2007; and

(j) **Defendant TIC-The Industrial Company's Unopposed Motion To Submit Response to Plaintiff's Supplemental Authority** [# 298], filed December 19, 2007;

5. That the Trial Preparation Conference set for Friday, September 26, 2008, at 9:00 a.m., as well as the trial,

currently set to commence on Monday, September 29, 2008, are **VACATED;** and

6. That defendants are **AWARDED** their costs to be taxed by the Clerk of the Court pursuant to Fed.R.Civ.P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Footnotes

FN1. In addition, plaintiff has settled with a number of other defendants for activities related to the Summitville Mine.

FN2. It is not necessary for purposes of resolving the present motion to reveal the exact dollar amounts of either of these settlements. Nor is the mere fact of the existence of a settlement confidential under either agreement. For these reasons, **Defendant TIC-The Industrial Company's Motion To Remove Confidential Designation from Travelers and USF & G Settlement Agreements (Filed Under Seal)** [# 196], filed January 2, 2007, will be denied as moot.

FN3. In *Burlington Northern*, the court considered a non-settling CERCLA defendant's right to credit for the settlement of a co-defendant in regard to the Rocky Mountain Arsenal Superfund Site. The site was comprised of two distinct parcels: a pond impoundment on the western portion of the site, as to which defendants were found jointly and severally liable; and a plant impoundment at the eastern portion of the site, as to which only the settling defendant was found liable for recovery costs. *Burlington Northern*, 200 F.3d at 696. The Tenth Circuit affirmed the district court's conclusion that the harms caused by the two defendants

were divisible between the two separate sites, and that credit for the settlement could be apportioned accordingly, even absent specific language in the settlement agreement to that effect. *See id.* at 697-98.

FN4. The expert report of Garth Allen, submitted by plaintiff in support of his position that the settlement funds may be allocated between indemnification and defense costs, does not change this result. Given the silence of the settlement agreements regarding allocation, this testimony is far too speculative to be admissible and consequently, does not create a genuine issue of material fact for trial.

FN5. There is a limited exception to this rule, which allows recovery of attorney fees incurred in identifying other potentially responsible parties, but there is no indication that this exception is implicated in this case. *See Atlantic Richfield Co.*, 98 F.3d at 571.

FN6. Plaintiff's argument that any allocation he might have bargained for would have been meaningless, since the settling defendants had no vested interest in how the settlement monies were allocated and would have agreed to any allocation he suggested (Plf. Resp. Br. at 16-17), is logically unsound. As plaintiff himself recognizes, settlement agreement allocations are subject to judicial scrutiny. *See Vitkus v. Beatrice Co.*, 127 F.3d 936, 944 (10th Cir.1997). Thus, contrary to plaintiff's argument, it is, in fact, quite likely that settling defendants, interested in preserving the integrity of their settlements, will not blithely agree to any allocation proposed by plaintiffs without regard to reasonableness. *See id.*

Filed: 7/28/09
No. 08-1042
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT M. FRIEDLAND,
Plaintiff - Appellant,
v.
TIC - THE INDUSTRIAL COMPANY;
GEOSYNTEC CONSULTANTS INC., f/k/a
Geoservices, Inc.,
Defendants - Appellees.

UNISYS CORPORATION, a Delaware corporation,
Amicus Curiae.

ORDER

Before TACHA, BALDOCK, and O'BRIEN, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

USCA Title 42. The Public Health and Welfare
Chapter 103. Comprehensive Environmental Response, Compensation, and Liability
Subchapter I. Hazardous Substances Releases, Liability, Compensation

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by--

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner

or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed--

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of Title 49), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i)

the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33, 46, or 46 Appendix, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Rendering care or advice

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) Indemnification, hold harmless, etc., agreements or

conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Natural resources liability; designation of public trustees of natural resources

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust

restriction on alienation: *Provided, however*, That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or

acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this title the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of Title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this chapter and such section 1321 of Title 33 for those natural resources under their

trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33.

(g) Federal agencies

For provisions relating to Federal agencies, see section 9620 of this title.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) or the absence of any physical damage to the proprietary interest of the claimant.

(i) Application of a registered pesticide product

No person (including the United States or any State or Indian tribe) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and

Rodenticide Act [7 U.S.C.A. § 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

(k) Transfer to, and assumption by, Post-Closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other

law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 9641 of this title when--

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act [42 U.S.C.A. § 6926(b)]) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this

subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 of this title may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to

which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) Suspension of liability transfer

Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 9611 of this title, no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund established by section 9641 of this title prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) Study of options for post-closure program

(A) Study

The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the

protection of human health and the environment.

(B) Program elements

The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and close such facilities in a manner which assures protection of human health and the environment.

(C) Assessments

The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act [42 U.S.C.A. § 6925] and the likelihood of future insolvency on the part of owners and operators of

such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to--

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) Procedures

In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) Consideration of options

In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (B) and to assure

that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to--

(i) revisions to closure, post-closure, and financial responsibility requirements under subtitles C and I of the Solid Waste Disposal Act [42 U.S.C.A. §§ 6921 et seq. and 6991 et seq.];

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 9641 of this title, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a

federally chartered corporation.

(F) Recommendations

The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appropriate committees of Congress for additional authority to implement such program.

(*l*) Federal lien

(1) In general

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) of this section) shall constitute a lien in favor of the United States upon all real property and rights to such property which--

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 9613 of this title.

(3) Notice and validity

The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of Title 26.

(4) Action in rem

The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) Maritime lien

All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) of this section with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(n) Liability of fiduciaries

(1) In general

The liability of a fiduciary under any provision of this chapter for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.

(2) Exclusion

Paragraph (1) does not apply to the extent that a person is liable under this chapter independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity.

(3) Limitation

Paragraphs (1) and (4) do not limit the liability pertaining to a release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

(4) Safe harbor

A fiduciary shall not be liable in its personal capacity under this chapter for--

(A) undertaking or directing another person to undertake a response action under subsection (d)(1) of this section or under the direction of an on scene coordinator designated under the National Contingency Plan;

(B) undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the vessel or facility;

(C) terminating the fiduciary relationship;

(D) including in the terms of the fiduciary agreement a covenant, warranty, or other term or

condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

(E) monitoring or undertaking 1 or more inspections of the vessel or facility;

(F) providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

(G) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

(H) administering, as a fiduciary, a vessel or facility that was contaminated before the fiduciary relationship began; or

(I) declining to take any of the actions described in subparagraphs (B) through (H).

(5) Definitions

As used in this chapter:

(A) Fiduciary

The term "fiduciary"--

(i) means a person acting for the benefit of another party as a bona fide--

(I) trustee;

(II) executor;

(III) administrator;

(IV) custodian;

(V) guardian of estates or guardian ad litem;

(VI) receiver;

(VII) conservator;

(VIII) committee of estates of incapacitated persons;

(IX) personal representative;

(X) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

(XI) representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in subclauses (I) through (X); and

(ii) does not include--

(I) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is

engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or

(II) a person that acquires ownership or control of a vessel or facility with the objective purpose of avoiding liability of the person or of any other person.

(B) Fiduciary capacity

The term "fiduciary capacity" means the capacity of a person in holding title to a vessel or facility, or otherwise having control of or an interest in the vessel or facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(6) Savings clause

Nothing in this subsection--

(A) affects the rights or immunities or other defenses that are available under this chapter or other law that is applicable to a person subject to this subsection; or

(B) creates any liability for a person or a private right of action against a fiduciary or any other person.

(7) No effect on certain persons

Nothing in this subsection applies to a person if the

person--

(A)(i) acts in a capacity other than that of a fiduciary or in a beneficiary capacity; and

(ii) in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

(B)(i) is a beneficiary and a fiduciary with respect to the same fiduciary estate; and

(ii) as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(8) Limitation

This subsection does not preclude a claim under this chapter against--

(A) the assets of the estate or trust administered by the fiduciary; or

(B) a nonemployee agent or independent contractor retained by a fiduciary.

(o) De micromis exemption

(1) In general

Except as provided in paragraph (2), a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under this chapter if liability is based solely on paragraph (3) or

(4) of subsection (a), and the person, except as provided in paragraph (4) of this subsection, can demonstrate that--

(A) the total amount of the material containing hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation); and

(B) all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.

(2) Exceptions

Paragraph (1) shall not apply in a case in which--

(A) the President determines that--

(i) the materials containing hazardous substances referred to in paragraph (1) have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or

(ii) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter or has impeded or is impeding, through action or inaction, the performance of a response action or natural

resource restoration with respect to the facility; or

(B) a person has been convicted of a criminal violation for the conduct to which the exemption would apply, and that conviction has not been vitiated on appeal or otherwise.

(3) No judicial review

A determination by the President under paragraph (2)(A) shall not be subject to judicial review.

(4) NonGovernmental third-party contribution actions

In the case of a contribution action, with respect to response costs at a facility on the National Priorities List, brought by a party, other than a Federal, State, or local government, under this chapter, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraph (1)(A) and (B) of this subsection are not met.

(p) Municipal solid waste exemption

(1) In general

Except as provided in paragraph (2) of this subsection, a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under paragraph (3) of subsection (a) of this section for municipal solid waste disposed of at a facility if the person, except as provided in paragraph (5) of this subsection, can demonstrate that the person is--

(A) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility;

(B) a business entity (including a parent, subsidiary, or affiliate of the entity) that, during its 3 taxable years preceding the date of transmittal of written notification from the President of its potential liability under this section, employed on average not more than 100 full-time individuals, or the equivalent thereof, and that is a small business concern (within the meaning of the Small Business Act (15 U.S.C. 631 et seq.)) from which was generated all of the municipal solid waste attributable to the entity with respect to the facility; or

(C) an organization described in section 501(c)(3) of Title 26 and exempt from tax under section 501(a) of Title 26 that, during its taxable year preceding the date of transmittal of written notification from the President of its potential liability under this section, employed not more than 100 paid individuals at the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

For purposes of this subsection, the term "affiliate" has the meaning of that term provided in the definition of "small business concern" in regulations promulgated by the Small Business Administration in accordance with the Small Business Act (15 U.S.C. 631 et seq.).

(2) Exception

Paragraph (1) shall not apply in a case in which the President determines that--

(A) the municipal solid waste referred to in paragraph (1) has contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility;

(B) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter; or

(C) the person has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility.

(3) No judicial review

A determination by the President under paragraph (2) shall not be subject to judicial review.

(4) Definition of municipal solid waste

(A) In general

For purposes of this subsection, the term "municipal solid waste" means waste material--

(i) generated by a household (including a single or multifamily residence); and

(ii) generated by a commercial, industrial, or

institutional entity, to the extent that the waste material--

(I) is essentially the same as waste normally generated by a household;

(II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and

(III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

(B) Examples

Examples of municipal solid waste under subparagraph (A) include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

(C) Exclusions

The term "municipal solid waste" does not include--

(i) combustion ash generated by resource recovery facilities or municipal incinerators; or

(ii) waste material from manufacturing or processing operations (including pollution control

operations) that is not essentially the same as waste normally generated by households.

(5) Burden of proof

In the case of an action, with respect to response costs at a facility on the National Priorities List, brought under this section or section 9613 of this title by--

(A) a party, other than a Federal, State, or local government, with respect to municipal solid waste disposed of on or after April 1, 2001; or

(B) any party with respect to municipal solid waste disposed of before April 1, 2001, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraphs (1) and (4) for exemption for entities and organizations described in paragraph (1)(B) and (C) are not met.

(6) Certain actions not permitted

No contribution action may be brought by a party, other than a Federal, State, or local government, under this chapter with respect to circumstances described in paragraph (1)(A).

(7) Costs and fees

A nongovernmental entity that commences, after the date of the enactment of this subsection, a contribution action under this chapter shall be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and

expert witness fees, if the defendant is not liable for contribution based on an exemption under this subsection or subsection (o) of this section.

(q) Contiguous properties

(1) Not considered to be an owner or operator

(A) In general

A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if--

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not--

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business

entity that was potentially liable;

(iii) the person takes reasonable steps to--

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person--

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request

for information or administrative subpoena issued by the President under this chapter;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) At the time at which the person acquired the property, the person

(I) conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

(B) Demonstration

To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(C) Bona fide prospective purchaser

Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 9601(40) of this

title if the person is otherwise described in that section.

(D) Ground water

With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

(2) Effect of law

With respect to a person described in this subsection, nothing in this subsection--

(A) limits any defense to liability that may be available to the person under any other provision of law; or

(B) imposes liability on the person that is not otherwise imposed by subsection (a) of this section.

(3) Assurances

The Administrator may--

(A) issue an assurance that no enforcement action

under this chapter will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 9613(f) of this title.

(r) Prospective purchaser and windfall lien

(1) Limitation on liability

Notwithstanding subsection (a)(1) of this section, a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) Lien

If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

(3) Conditions

The conditions referred to in paragraph (2) are the

following:

(A) Response action

A response action for which there are unrecovered costs of the United States is carried out at the facility.

(B) Fair market value

The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

(4) Amount; duration

A lien under paragraph (2)--

(A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3); and

(D) shall continue until the earlier of--

(i) satisfaction of the lien by sale or other means; or

(ii) notwithstanding any statute of limitations under section 9613 of this tile, recovery of all response costs incurred at the facility

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Subchapter I. Hazardous Substances Releases, Liability, Compensation

§ 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may

allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be

commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced--

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability

for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after-
-

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run--

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup

standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(i) Intervention

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a

practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

(j) Judicial review

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures

(1) Administrative record

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures

(A) Removal action

The President shall promulgate regulations in accordance with chapter 5 of Title 5 establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action

The President shall provide for the participation of

interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regulations in accordance with chapter 5 of Title 5 to carry out the requirements of this subparagraph.

(C) Interim record

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this chapter shall not include an adjudicatory hearing.

(D) Potentially responsible parties

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(l) Notice of actions

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.